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upon to pass upon this provision, all suits coming before it having been brought within the two years prescribed.

In *McCready v. Sexton & Son*, 29 Iowa 356, 4 Am. Rep. 214, a similar provision was involved, the period of limitation being three instead of two years as provided by our statute. The court held that the clause making the treasurer's deed conclusive evidence of the regularity of all prior proceedings was unconstitutional, as depriving a person of his property without due process of law, so far as respects the essential prerequisites for the exercise of the taxing power, such as the assessment, levy, sale and the like; as to non-essentials, or matters merely directory it was declared to be constitutional.

WESTERN UNION TELEGRAPH CO., INC., *v.* BILISOLY.

June 11, 1914.

[82 S. E. 91.]

Commerce (§ 8*)—Interstate Commerce—Regulation—Effect.—Act Cong. June 18, 1909, c. 309, 36 Stat. 539, which placed telegraph companies, so far as interstate business was concerned, under the direct supervision of the interstate Commerce Commission, rendered inapplicable to such business state statutes imposing a penalty upon telegraph companies for failure to promptly transmit messages, although such statutes had been upheld, even as to interstate messages, until Congress acted.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.*]

Error to Circuit Court of City of Norfolk.

Action by E. A. Bilisoly against the Western Union Telegraph Company, Incorporated. There was a judgment for plaintiff, and defendant brings error. Reversed.

Hughes, Little & Seawell, of Norfolk, for plaintiff in error
Robert W. Shultice, of Norfolk, for defendant in error.

HARRISON, J. This action was brought by E. A. Bilisoly against the Western Union Telegraph Company to recover the statutory penalty for alleged delay of a certain telegraphic message, known as a "night letter."

It appears that the message was sent from the city of New York on the night of December 19, 1912, by Messrs. Kemble and Mills, of that city, to E. A. Bilisoly, at Norfolk, Va. This message was received at the Norfolk office of the telegraph company about 3 o'clock on the morning of December 20, 1912.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Messages of this class are sent at a much lower rate than the ordinary message, and the contract for its transmission and delivery contemplates an essentially different handling of the message from that provided by section 1294h, clause 6, of the Virginia Code 1904, under which this proceeding was instituted. Instead of a delivery as promptly as practicable after arrival, only a delivery on the morning of the next ensuing business day is required, and a delivery by mail instead of by messenger is permitted.

The testimony of the plaintiff shows that the message was delivered to him at his office at 10:56 o'clock on the morning of December 20th, while that of the defendant shows that three efforts had been made to effect a delivery before the message was delivered; the messenger finding no one at the plaintiff's office.

The Virginia statute is essentially penal, demanding a forfeiture of \$100 of the telegraph company for failure to forward or deliver a message as promptly as practicable. Penal statutes must be construed strictly, and it may well be doubted whether this statute can be extended so as to apply to a special contract like the present, where the terms of transmission and delivery are wholly different from those contemplated by the statute; a delayed service being contracted for, rather than one involving as prompt a delivery as practicable. We do not, however, rest our conclusion in this case upon the ground mentioned.

By an act of Congress approved June 18, 1910 (36 Stat. 539, c. 309), telegraph companies, so far as interstate business is concerned, have been placed under the direct supervision of the Interstate Commerce Commission, and are subject, so far as applicable, to the same rules, regulations, restrictions, and penalties that are imposed upon common carriers. This act has occupied the entire field and taken complete control of the regulation of telegraph companies, and while it has impliedly exempted them from any penalty for negligence it has provided a severe maximum penalty for intentional discrimination. Before the passage of this act there had been no legislation by Congress affecting or conflicting with the state statutes imposing a penalty for failure to deliver messages promptly, and therefore the state statutes affecting telegraph companies were upheld, even as to interstate messages, upon the ground that until Congress had legislated upon the subject-matter of telegraph companies, the state statutes were applicable. *James Case*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Commercial Milling Co. Case*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088; *Crovo Case*, 220 U. S. 364, 31 Sup. Ct. 399, 55 L. Ed. 498, and others.

In *Telegraph Co. v. White*, 113 Va. 421, 74 S. E. 174, this court, in reviewing the cases on the subject, adopts the language of the Supreme Court, that where the state statute did not unfavorably affect or embarrass the telegraph company in the course of its employment, it would be held valid *until Congress spoke on the subject*. These decisions are based upon the fact that, at the time they were rendered, no congressional legislation existed on the subject. Such judicial utterances would mean nothing, unless they meant that when Congress did act, and undertake to regulate telegraph companies in the matter of the transmission and delivery of interstate messages, the statutes of the state on the subject would be superseded by that action. It would be inconvenient, as well as unnecessary, to recite the detailed provisions of the act of Congress approved June 18, 1910. It is sufficient to say that by it Congress has occupied the field of regulation with respect to interstate telegrams, and hence the state statute imposing a penalty for failure to make prompt delivery can no longer be invoked in such cases. The act of Congress has ousted the state of jurisdiction over the subject.

From this conclusion it follows that the judgment of the lower court in favor of the plaintiff must be reversed, the verdict of the jury set aside, and this court will enter such judgment as should have been entered, dismissing the case, with costs in favor of the defendant.

Reversed.

MERCHANT'S ADM'R v. SHRY.

June 11, 1914.

[82 S. E. 106.]

Death (§ 43*)—Actions against Convicts—Statutory Provisions.—Code 1904, § 2902, gives a right of action for wrongful death, though the act amounts to a felony. Section 4115 authorizes the appointment of a person to take charge of the estate of a convict. Section 4116 provides that such committee may sue or be sued in respect to debts due to or by the convict, "and any other of the convict's estate." Section 4120 provides that, if any person so appointed refuse to act or qualify, the court shall commit the estate to the sheriff of the county or sergeant of the corporation, who shall be the committee. Held, that section 4116 authorizes actions against the committee on any cause of action existing against the convict, and, while at common

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